Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

IVAN RODRIGUEZ,

Petitioner,

v.

WILLIAM M. DALEY, SECRETARY OF COMMERCE
OF THE UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

MICHAEL G. KANE
Counsel of Record
MEREDITH S. FRANCIS
CASHDAN & GOLDEN, PLLC
1150Connecticut Ave, N.W.
Suite 900
Washington, D.C. 200
(202) 862-4330
Counsel for Petitioner

January 14, 1999

54 pp

QUESTION PRESENTED

Whether an employer is liable for discrimination where the ultimate decision-maker relies, in good faith, on the falsehoods of a supervisor who has a motive to discriminate against the employee?*

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* The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ivan Rodriguez respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on August 20, 1998. The court denied Petitioner's Petition for Rehearing with Suggestion for Rehearing In Banc on October 16, 1998.

OPINIONS BELOW

Ivan Rodriguez filed a complaint on March 10, 1995, in the United States District Court for the District of Maryland, alleging employment discrimination on the basis of his national origin. On April 21, 1997, the district court granted summary judgment to defendant on all counts. The decision of the district court is set out at pp. A-19 – A-30 of the Appendix.

Following oral argument, a three-judge panel of the Fourth Circuit affirmed the district court's decision. The Fourth Circuit's decision, *Rodriguez v. Kantor*, Case No. 97-1668 (4th Cir. 1998), is set out at pp. A-1 – A-16 of the Appendix. The Court ruled that Count I, which alleged discrimination in the terms and conditions of employment, was properly dismissed because Mr. Rodriguez failed to allege an adverse employment action. App at A-9. According to the appellate court, this Count also failed because Mr. Rodriguez did not produce evidence of a hostile environment based on national origin. App at A-11. The Court affirmed dismissal of Count II – the discriminatory discharge claim – because there was no evidence showing that Mr. Rabbitt, Lynch's supervisor and the ultimate decision-maker, acted in bad faith. App at A-14. Finally, the Court concluded that the retaliation charge in Count III was properly dismissed because Mr. Rodriguez failed to show that he complained of national origin discrimination. App at A-15. The Court also ruled that Mr. Rodriguez failed to show a causal connection between his complaint and the adverse action. *See id.*

JURISDICTION

The decision of the court of appeals was entered on August 20, 1998. Appellant petitioned for rehearing with suggestion for rehearing *en banc*, which the court denied on October 16, 1998. This Petition is timely in accordance with

the 90 day filing requirement of Supreme Court Rule 13.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The pertinent portions of 42 U.S.C. § 2000e-16 are set out at pp. A-31 of the Appendix.

STATEMENT OF THE CASE

Petitioner, Ivan Rodriguez, commenced this action in 1995 in the United States District Court for the District of Maryland against Ronald Brown, then Secretary of Commerce of the United States of America, alleging employment discrimination on the basis of his national origin. The action arises out of Mr. Rodriguez' employment as a custodial worker with the National Institute of Standards and Technology ("NIST") at the Department of Commerce (the "Agency") from December 13, 1993 until his termination less than three months later, on March 7, 1994. The jurisdiction of the district court in this action was invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and under 28 U.S.C. § 1331 (general federal question jurisdiction).

Throughout his brief employment with NIST, Mr. Rodriguez' responsibilities included throwing out or "pulling" trash and recyclable material form the various buildings on the NIST campus. He was also responsible for stripping and waxing floors. Patricia Lynch, the Janitorial Services Group Leader, Facilities Services Division ("FSD"), who is white, was Mr. Rodriguez' second line supervisor. Joint Appendix ("JA) 111.[1]

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[1] All references to the Joint Appendix are cited "JA" followed by the relevant page number(s). The Joint Appendix was filed in the Fourth Circuit along with the

As petitioner set forth at length in both his brief opposing defendant's motion for summary judgment and his brief appealing the district court's decision granting summary judgment in favor of defendant on all counts, Mrs. Lynch was prejudiced against Mr. Rodriguez because he is Hispanic and sought his termination because of his Hispanic national origin.

The record evidence demonstrates that Mrs. Lynch directed her hatred of Hispanics toward Mr. Rodriguez on numerous occasions. For instance, among other discriminatory comments, she explicitly stated that "she did not want to hire any more minorities" (Testimony of Richard DiLisi, a custodian who worked with Mr. Rodriguez; JA 300), and "If I had my way, I would not hire Hispanics" (Testimony of Charles N. Lyles, Mr. Rodriguez' first line supervisor; JA 283-284).

Mr. Rodriguez began working in the Janitor Group on January 4, 1994. JA 49. Mr. Lyles, Mr. Rodriguez' African American first-line supervisor, recognized the quality of Mr. Rodriguez' work, stating that "As his immediate supervisor, it is my opinion that Mr. Rodriguez did an excellent job of pulling trash and stripping and waxing floors. He had a commendable work ethic and was always very polite and respectful." JA 284.

Despite such accolades from others, Mrs. Lynch was hypercritical of Mr. Rodriguez' performance. She continually yelled at him, gave him unrealistic assignments, subjected him to rules that applied only to him, found fault with his work, and isolated him from his colleagues. It appeared to Mr. Rodriguez's supervisors, Wilson and Lyles, that Mrs. Lynch was trying to get Mr. Rodriguez to resign. JA 285-293.

The final and most severe action taken by Mrs. Lynch in her efforts to get rid of Mr. Rodriguez was her fabrication of a story that Mr. Rodriguez threatened her life.

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briefs of petitioner and respondent submitted thereto; however, it is not appended to this Petition.

She reported this fabricated story to Mr. Rabbitt, who then terminated Mr. Rodriguez' employment.

Mr. Rodriguez presented evidence that Mrs. Lynch fabricated the threat against her Mr. Rodriguez also presented evidence that the three co-workers who testified on Mrs. Lynch's behalf had a motive to lie because they were all indebted to Mrs. Lynch for favors.

The district court held that evidence of Mrs. Lynch's prejudice and the co-workers' possible motive to falsify affidavits was irrelevant to Mr. Rodriguez' discriminatory discharge claim because the person who rendered the decision to terminate Mr. Rodriguez, Mr. Rabbit, acted in "good faith" and was unaware of Mrs. Lynch's discriminatory animus and the co-workers' motive to falsify their affidavits:

> These arguments, even if true, fail to demonstrate that Mr. Rodriguez was not terminated because of Mr. Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct serious enough to warrant dismissal.

App at A-29.

The court of appeals panel explicitly adopted the district court's rule stating:

> The district court concluded correctly that Rodriguez failed to "demonstrate that [he] was not terminated because of Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct serious enough to warrant dismissal." The district court also noted correctly that Rodriguez did not produce any evidence to show that Rabbitt terminated Rodriguez because of his national origin.

App at A-14. Thus, disregarding all of the evidence of Mrs. Lynch's discriminatory and retaliatory conduct, the co-worker's motive to lie, and Mr. Rabbitt's reliance on these fabrications, the Fourth Circuit Court of Appeals affirmed the district court holding that an employer is not liable for discriminatory discharge where the decision-maker acts in good faith, even where the good faith decision is based upon the falsehoods of a supervisor who has a motive to discriminate.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit permits an employer to escape liability for employment discrimination so long as the decision-maker acts in good faith. Thus, the employer is not liable even in situations, like the one here, where the innocent decision-maker relies upon false information provided by a biased supervisor. As explained in greater detail below, no Circuit in the United States has adopted the Fourth Circuit's holding in this case, and the Fourth Circuit's holding is in contravention of this Court's recent decision in *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998). As such, a writ of certiorari should issue.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF ALL OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE

The core holding adopted by the court below is that an employer will escape liability for employment discrimination where the decision-maker acts in good faith:

> The district court concluded correctly that Rodriguez failed to "demonstrate that [he] was not terminated because of Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct

> serious enough to warrant dismissal." The district court also noted correctly that Rodriguez did not produce any evidence to show that Rabbitt terminated Rodriguez because of his national origin.

App at A-14.

All of the other circuits that have addressed this issue have expressly rejected the Fourth Circuit's rule and have all held that, under Title VII, an employer can be liable for adverse action taken against an employee, even where the ultimate decision-maker acts in good faith, so long as there is evidence that the innocent decision-maker relied upon or was influenced by false information provided by a supervisor who had a discriminatory motivation.

The Seventh Circuit in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) reversed a lower court's entry of summary judgment in favor of the employer where there was evidence that the independent committee that reviewed and approved the decision to terminate the appellant might have been influenced by the allegedly discriminatory animus of the appellant's supervisor, stating:

> If [the committee] acted as the conduit of [the supervisor's] prejudice – his cat's-paw – the innocence of its members would not spare the company from liability.

See id. at 405

Circuit courts throughout the nation hold that an employer may be liable for adverse action against an employee where the decision-maker, in good-faith, relies upon false information provided by a subordinate who has a motive to discriminate against the employee.

For example, the Fifth Circuit held in *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) that:

> If . . . [the decision-maker] did not conduct his own independent investigation, and instead merely 'rubber stamped' the recommendations of [those who held the discriminatory animus], the causal link between [the plaintiffs'] protected activities and their subsequent termination, would remain intact.

See also Steverson v. Goldstein, 24 F.3d 666, 670 (5th Cir. 1994) (rejecting the defendant-employer's argument that "[plaintiff's supervisor's] 'actions cannot be imputed to the [defendant] because he is not the final decision maker and because of the Commission's subsequent actions in reviewing the discipline[]'" and, therefore, upholding lower court's decision that the employer was liable for discriminatory suspension of the plaintiff).

The Sixth Circuit held in *Simpson v. Diversitech Gen'l, Inc.*, 945 F.2d 156, 160 (6th Cir. 1991) that:

> If [plaintiff's supervisor] initiated the disciplinary action leading to [plaintiff's] dismissal due to [plaintiff's] race, simply showing that [plaintiff's supervisor] had no role in the 'final' decision to terminate him is insufficient to establish that [defendant-company] would have made the same decision even absent the racial animus" and, therefore, was insufficient to overcome liability.

The Eight Circuit holds that:

> '[A]n employer cannot escape responsibility for discrimination when

> the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of women[]'.

Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316, 1323 (8th Cir. 1994) (internal punctuation and citations omitted).

In *Perez v. Curcio*, 841 F.2d 255, 258 (9th Cir. 1988) the Ninth Circuit held that:

> The district court erred in finding that [plaintiff's supervisor] was not involved in the demotion decision [where there was evidence that the supervisor] made the report that motivated the investigation . . . Although most of [plaintiff's] evidence of [her supervisor's] intent is remote from the actual demotion decision, and although the evidence of [her supervisor's] intent to discriminate is weak, the strength of the evidence is a question for the jury, not for the court on summary judgment.

The Eleventh Circuit holds that summary judgment is inappropriate where there is an issue of material fact as to whether the alleged harasser influenced the decision-maker to fire plaintiff. *See Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1565 (11th Cir. 1987).

Finally the District of Columbia Circuit holds that:

> [W]e join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not

> insulated from the subordinate's influence.

Griffin v. Washington Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998).

In short, all circuits that have addressed this issue are in conflict with the Fourth Circuit. This is an important conflict that the Court should resolve. The Fourth Circuit's rule will permit employers to mask possibly discriminatory actions by having a management employee, who has no connection with the disputed employment decision, review the decision and approve it. So long as the management employee is isolated from any discriminatory motivations, the employment action will not be discriminatory even if the information the management employee relies upon has been filtered through a supervisor intent on ridding the workforce of a minorities. The Court should not let this rule stand in the Fourth Circuit.

II. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN *ELLERTH*

In *Burlington Indus. v. Ellerth*, 118 S.Ct. 2257 (1998), the Court explained that an employer is always liable for a supervisor's discriminatory acts when the supervisor's actions result in a tangible employment loss for the employee. *See id.* at 2268 (stating, "Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action . . . Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard").

The Court also addressed the particular question at issue in this petition; that is, whether an employer is liable when the decision to terminate is made by a more senior official who unknowingly relies on falsehoods provided by

the discriminating supervisor. *See id.* at 2269. The Court answered this question in the affirmative:

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. E.g., Shager v. Upjohn Co., 913 F.2d 398, 405 (C.A. 7 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the Committee functioned as the supervisor's "cat's paw"). The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

Id. (italics omitted in original).

Applying the Supreme Court rule in *Ellerth* to the facts of this case, the relevant question is not whether Mr. Rabbitt acted in good faith, as the district and appellate courts held, but, instead, whether there is evidence from which a jury could believe that Mrs. Lynch, petitioner's supervisor, discriminated and retaliated against him by fabricating alleged threats in order to get Mr. Rodriguez fired. If there is such evidence, then, in accordance with *Ellerth*, Mrs. Lynch's discriminatory act should be imputed to the Agency regardless of Mr. Rabbitt's alleged good faith. Taking into account that "[t]he evidence of [Mr. Rodriguez] is to be believed, and all justifiable inferences are to be drawn in his favor," *Anderson v. Liberty Lobby*, 477 U.S.

242, 255 (1986), a factfinder could easily draw such a conclusion from the totality of the evidence in this case.

The evidence of discriminatory and retaliatory motive on the part of petitioner's supervisor, Mrs. Lynch, is overwhelming. The following statements are instructive:

> Before Mr. Rodriguez was hired, Mrs. Lynch told me that she did not want to hire any foreigners. At a later date, Mrs. Lynch said, "Mr. Rodriguez, who is Spanish and from New York will be coming on board. I do not want to hire him, but I have no choice."

JA 283-284. (Testimony of Charles N. Lyles, Mr. Rodriguez' first line supervisor).

> Sometime, I believe that it was during the month of November 1993, Mrs. Lynch entered my work area and said, "I have to hire this son of a bitch whether I want to or not." I asked her who she was referring to and she said, "this guy Rodriguez."
>
> She further stated, "as you know, Hispanics and Blacks do not get along together. If I had my way, I would not hire Hispanics."

JA 292. (Testimony of Henry L. Wilson, another first line supervisor).

> [Mrs. Lynch] said that she did not like [Mr. Rodriguez] because he was Hispanic and she believed that Hispanics and Blacks do not get along.

> On another occasion before Mr. Rodriguez reported for duty, Mrs. Lynch told me that Hispanics and Vietnamese come to this county and take jobs from Americans.

JA 309. (Testimony of Delores W. Christian, a support clerk in FSD).

> Before Mr. Rodriguez was hired, I heard Mrs. Lynch say she did not want to hire any more minorities, but that a Hispanic was going to come on board shortly.

JA 300. (Testimony of Richard DiLisi, a custodian who worked with Mr. Rodriguez).

The absence of any reference to this direct evidence of the discriminatory animus of Mr. Rodriguez' supervisor indicates that the court of appeals panel considered this evidence totally irrelevant to the question of whether the employer should be liable in this case. Under *Ellerth*, such blatant evidence must be factored into the analysis.

Moreover, the court of appeal's rule that where the decision-maker acts in good faith an employer is insulated from liability, regardless of the decision-maker's reliance on fabrications of racist supervisor, led the appellate panel to discount significant circumstantial evidence of Mrs. Lynch's discriminatory and retaliatory motive as well.

First, it was Mrs. Lynch who brought to the attention of Mr. Rabbitt the alleged threats – and not the persons who allegedly heard the threats – mere days after Mr. Rabbitt told Mrs. Lynch that Mr. Rodriguez had been in to see him about her conduct. JA 54-55, 197.

Second, there was evidence to support the fact that Mrs. Lynch had blown out of proportion the reports of Oyre, Shanholtz and Clary that Mr. Rodriguez had allegedly threatened Mrs. Lynch. Their reports hardly appeared to

indicate a serious threat. Neither Mr. Clary nor Mr. Oyre thought Mr. Rodriguez was serious about the alleged threats. JA 346, 396. All three persons who heard the alleged threats testified that they were made at a time when employees blow off steam at the end of the day. JA 356, 396, 389. Comments like the ones that Mr. Rodriguez is alleged to have made were not uncommon. JA 354-355, 387. Additionally, Mr. Clary, Mr. Oyre and Mrs. Shanholtz did not immediately report what they allegedly heard Mr. Rodriguez say to management. The only reason management found out about the alleged statements was because Mrs. Shanholtz allegedly mentioned it to Mrs. Lynch in a conversation initiated by Mrs. Lynch herself approximately two weeks after the alleged statements were made and mere days after Mrs. Lynch was apprised that Mr. Rodriguez complained about her to Mr. Rabbitt. A jury could conclude from this evidence that Mrs. Lynch plucked out of context and distorted idle banter among employees shared at the end of the workday in order to further her discriminatory and retaliatory motives.

Third, Mrs. Lynch's actions were wholly inconsistent with the notion that she had been threatened. Mrs. Lynch did not ask for protection when she solicited the statements from Mrs. Shanholtz. Indeed, she continued to work with Mr. Rodriguez and to give him assignments. JA 114, 282, 196, 214, 226.

Fourth, Mrs. Lynch could not have seriously entertained any notion that Mr. Rodriguez' alleged actions warranted his termination because she engaged in the same kind of behavior with impunity. When she learned that Mr. Rodriguez had filed a complaint against her, Mrs. Lynch threatened to hire someone to shoot Mr. Rodriguez. Mrs. Lynch stated this threat to Mr. Oyre –one of Mr. Rodriguez' accusers. JA 300-301.

Fifth, Mr. Rodriguez has consistently denied making any kind of threatening comment against Mrs. Lynch. JA 52, 56. The appellate panel's statement that Mr. Rodriguez refused to fill out an affidavit denying the threats is incorrect.

App at A-14. In fact, Mr. Rodriguez verbally denied the threats and left with forms to enable him to fill out an affidavit. JA 405.

Sixth, a reasonable jury could conclude that Mrs. Lynch was able to get her three subordinates – Hoffman, Oyre and Shanholtz -- who testified that Mr. Rodriguez made the threats to lie at her request because they were all indebted to her for favors. Mrs. Lynch required Mr. Rodriguez to leave one or more spaces on a sign-in sheet (between his name and the last person to previously sign-in) so that three white employees -- Oyre, Shanholtz and Clary -- could sign in late and falsely state that they had arrived before the time Mr. Rodriguez signed in at 9:30 a.m.. JA 57, 308. Delores Christian, the timekeeper, corroborated that Mrs. Lynch required Mr. Rodriguez to leave space on the time-sheets. JA 308.

A jury could well conclude that Oyre, Shanholtz and Clary also lied at Mrs. Lynch's request because they owed their continued employment to staying in her good graces. As the appellate panel concluded, the evidence showed that "Lynch tended to be overbearing on her employees, and aspired to exact over them a level of control that was ultimately unattainable." App at A-6.

In light of the *Ellerth* case and the evidence cited above, it is irrelevant that Mr. Rabbitt acted in good faith with the approval of the personnel office in deciding to terminate Mr. Rodriguez. What is relevant is whether Mr. Rabbitt unknowingly relied upon lies provided by a prejudiced supervisor. The evidence above, viewed in a light most favorable to Mr. Rodriguez, would lead a reasonable fact-finder to conclude that the prejudiced supervisor, Mrs. Lynch, "set-up" Mr. Rodriguez with false accusations of threats, and that she did so because Mr. Rodriguez was Hispanic and complained of her discriminatory treatment of him. JA 54-55. Mrs. Lynch then used the Agency's disciplinary process as the conduit of her prejudice.

Accordingly, the Court should grant petitioner's writ of certiorari in order to address the Fourth Circuit's rule, which is in conflict with the Court's *Ellerth* decision.

III. THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

This case presents important issues of substantial importance because it will have a very real impact on the way employees are treated in the Fourth Circuit. For example, a racist supervisor now knows that he can terminate a black subordinate because of that subordinate's race so long as he comes up with what sounds like a plausible reason and gets a supervisor, who is not familiar with his bias, to sign off on his termination recommendation. The employer's defense will be air tight so long as the employee cannot prove that the approving supervisor was aware of the biased supervisor's discriminatory motivation. The employer will escape liability if the approving supervisor acted in good faith on the recommendation or influence of the racist supervisor. The Court should take this powerful weapon out of the hands of employers in the Fourth Circuit.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

MICHAEL G. KANE
Counsel of Record
MEREDITH S. FRANCIS
CASHDAN & GOLDEN, PLLC
1150 Connecticut Ave, N.W.
Suite 900
Washington, D.C. 20016
(202) 862-4330

Counsel for Petitioner